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April 1, 2008

Via U.S. Mail and E-Mail

Hontesto Gatchalian (inj@cpuc.ca.gov)
California Public Utilities Commission
Energy Division (DMS Branch) – Tariff Unit
505 Van Ness Avenue, Room 4005
San Francisco, CA 94102

RE: Draft Resolution E-4160
Center for Energy Efficiency and Renewable Technologies (CEERT) Comments

Dear Mr. Gatchalian:

On March 12, 2008, the Energy Division released Draft Resolution E-4160 (Draft Resolution) for comment. The Center for Energy Efficiency and Renewable Technologies (CEERT) hereby timely submits and serve the following comments in opposition to the Draft Resolution pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure and the instructions accompanying the Alternate.

Attached to these comments is CEERT's Motion for Expedited Stay and Withdrawal of Draft Resolution E-4160 filed in Commission Rulemaking (R.) 06-02-012 on March 28, 2008. This Motion details the many legal and substantive flaws of the Draft Resolution and is incorporated in full herein. For the reasons identified in the attached Motion, CEERT requests that the Energy Division withdraw the Draft Resolution in favor of an appropriately noticed opportunity to be heard by all stakeholders on the important issue of the implementation of SB 1036. In the absence of such a process, there is no record to support the findings, conclusions, and orders adopted by the Draft Resolution.

CEERT notes that, on March 28, 2008, Executive Director Paul Clanon wrote a letter addressing a request in which CEERT had joined with other Requesting Parties to bifurcate the issues resolved in the Draft Resolution. CEERT believes that this letter is vague as to its intent and impact on the Draft Resolution and continues to include a key issue that the Requesting Parties had asked to be excluded from decision absent further process. CEERT further believes that any process adopted to consider SB 1036 implementation should also allow for post-workshop comments or briefing.

Mr. Honesto Gatchalian
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For these reasons, CEERT's objections to the Draft Resolution remain as stated in the attached Motion, and CEERT requests that it be withdrawn and re-issued to address only those issues related to ratemaking treatment identified in the Requesting Parties' letter (Issues 1 to 3). CEERT reserves the right to submit reply comments on April 7, 2008.

Respectfully submitted,

April 1, 2008

By: /s/ SARA STECK MYERS
Sara Steck Myers

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Attachment

ATTACHMENT

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Develop Additional
Methods to Implement the California Renewables
Portfolio Standard Program.

Rulemaking 06-02-012
(February 16, 2006)

**MOTION OF THE
CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES
FOR EXPEDITED STAY AND WITHDRAWAL OF DRAFT RESOLUTION E-4160**

March 28, 2008

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Renewable Technologies

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CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES
FOR EXPEDITED STAY AND WITHDRAWAL OF DRAFT RESOLUTION E-4160**

The Center for Energy Efficiency and Renewable Technologies (CEERT) respectfully moves for an expedited stay and withdrawal of Draft Resolution E-4160 (Draft Resolution) from the Agenda for the Commission's Business Meeting of April 10, 2008. This motion is filed pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure.

**I.
BACKGROUND**

On October 14, 2007, Senate Bill (SB) 1036 was signed into law (Stats 2007, Ch. 685). SB 1036 makes significant changes to this Commission's implementation of California's Renewable Portfolio Standard (RPS) Program. Among other things, SB 1036 substantially revises portions of that law governing the function of the market price referent (MPR) and the availability and treatment of funds to cover "above-market" costs of renewables. How this language is interpreted and applied by the Commission have far-reaching consequences for the RPS Program and the ability of RPS-obligated retail sellers to meet the target 20% renewables procurement by 2010.

On November 21, 2007, an Administrative Law Judge's (ALJ's) Ruling was issued in this proceeding scheduling a Prehearing Conference (PHC) for December 10, 2007, which was to address 4 general areas. Among those designated areas was the "RPS market price referent

(MPR) for 2008, including examination and possible revision of MPR methodology (including but not limited to the use of a greenhouse gas adder).”¹

On December 6, 2007, CEERT filed a PHC Statement, which, on the MPR topic area, stated and requested the following:

“ . . . From CEERT’s perspective, the recent enactment of Senate Bill 1036 (Stats. 2007, Ch. 685) does not change, but in fact provides further impetus to re-examine the purpose, application, and calculation of the MPR. In this regard, the advent of SB 1036, Assembly Bill 32 (GHG emissions reduction) (Stats. 2006, Ch. 488), the CalWEA/GPI petition for modification, and D.07-09-028 all demonstrate how out-of-date the current MPR methodology developed in 2005 has become.

“CEERT, therefore, asks the Commission to address the following issues regarding the MPR immediately:

1. Consideration and determination or clarification of purpose and application of MPR for all RPS-compliant procurement (i.e., short-term and long-term contracts, tradable RECs, and tariffs).
2. Re-examination of the MPR methodology and calculation of MPR consistent with that purpose and current law, including AB 32 and SB 1036.”²

At the PHC of December 10, 2007, CEERT repeated this request and asked that a briefing schedule be adopted to permit full examination of the implications of SB 1036 on the MPR and above-market cost funding.

On February 8, 2008, an ALJ’s Ruling Requesting Pre-Workshop Comments on the 2008 RPS MPR was issued (February 8 ALJ’s Ruling). The February 8 ALJ’s Ruling specifically references SB 1036 and summarizes its basic changes related to funding of contract prices that exceed the MPR (“above-market costs of long-term contracts”).³ The February 8 ALJ’s Ruling includes Energy Division staff “suggestions” for the content of pre-workshop comments, but also permits parties the opportunity to raise other topics, with justification for their inclusion.

¹ ALJ’s Ruling of November 21, 2007, at p. 2.

² CEERT PHC Statement (December 6, 2007), at p. 2.

³ February 8 ALJ’s Ruling, at p. 3 and n.3.

Nowhere in the February 8 ALJ's Ruling is the topic of the legal and factual implications of SB 1036 excluded from the workshops or this proceeding.

On February 25, 2008, a Second Amended Scoping Memo and Ruling of Assigned Commissioner (Second Amended Scoping Memo) was issued in this proceeding. Among the issues identified as remaining within the scope of this proceeding was the following: "Developing the MPR for 2008 and exploring changes in the MPR methodology for 2008 and later years."⁴ The Second Amended Scoping Memo does not exclude consideration of the impact of SB 1036 on the MPR and certainly does *not* indicate that this issue will be resolved by *Energy Division resolution*.

On March 6, 2008, CEERT filed its pre-workshop comments on the 2008 MPR. Among other things, CEERT asked that "guidance" for comments, in particular the "guiding" principles and laws identified in the February 8 ALJ's Ruling, be modified to include, among other changes, the following:

"Any proposed modification to the MPR methodology, assumptions, and/or inputs should:

- **be consistent with the functions of the MPR,⁵ as modified by SB 1036."**⁶

In addressing this and other relevant modifications, CEERT stated:

"These modifications are necessary to recognize the significant change, which has occurred in the original, central function of the MPR (as an allocation point for supplemental energy payments (SEPs)) resulting from SB 1036, as well as recent Commission decisions, which have added to, as well as confirmed, the Commission's central policies and guidelines applicable to RPS Program implementation generally and the MPR specifically. CEERT, therefore, asks that its recommended changes above be made to 'guidance' on these comments and this process in general."⁷

⁴ Second Amended Scoping Memo, at p. 8.

⁵ D.05-12-042, at pp. 4-7.

⁶ CEERT Pre-Workshop Comments on 2008 MPR, at p. 2; emphasis original.

⁷ *Id.*, at pp. 2-3.

In its pre-workshop comments, CEERT further observed that “there has been no opportunity, and none has yet to be provided, for parties to be heard on the issue of the impact of SB 1036 on the methodology, calculation, or function of the MPR.”⁸ While noting that both the February 8 ALJ’s Ruling and the Second Amended Scoping Memo permitted this consideration, CEERT expressed the following concerns:

“While the February 8 ALJ’s Ruling references SB 1036 for the proposition that it effected changes to ‘funding above-market costs,’ this statement is offered without stakeholder input and does not definitively resolve the impact of this funding change on the function of the MPR. The February 8 ALJ’s Ruling also overlooks recent Commission decisions that have linked the MPR to other procurement (both renewable and non-renewable), further defined the goals for RPS Program implementation, and clarified the use of the MPR. Finally, while the recently issued Second Amended Scoping Memo and Ruling of Assigned Commissioner (Scoping Ruling), includes the general issue of ‘exploring changes in the MPR methodology for 2008 and later years,’ no process for addressing ‘changes’ resulting from SB 1036 as to the function or use of the MPR is provided.”⁹ (Footnotes omitted.)

CEERT concluded:

“Because SB 1036, as well as other recent regulatory actions and policies, directly affect the application and function of the MPR, CEERT, therefore, believes that any final decision confirming modifications to or application of the MPR methodology must only be made once all stakeholders have also been given the opportunity to be heard on the issues of the impact on the MPR of SB 1036 and recent Commission decisions.”¹⁰

To that end, CEERT requested that the Commission adopt the following process to permit stakeholder input on the important issue of SB 1036 implementation:

“[I]t is essential for the Commission to offer parties the opportunity to address changes either in the MPR methodology or its application that may be permitted under the law. The Workshop forum, which will focus on factual input assumptions, is not sufficient alone to accomplish this task. [¶] To that end, CEERT, therefore, requests that legal briefs on the MPR and its application to RPS procurement, in particular, with reference to the new ‘cost limitation’ assigned to each utility by SB 1036, be added as a task for the Second Quarter

⁸ Id.

⁹ Id., at p. 3.

¹⁰ Id., at pp. 3-4.

2008 in addition to post-workshop comments and reply comments. The filing date for such briefs should be at least two weeks after post-workshop comments are due.”¹¹

As of this date, there have been *no* objections to this request, and *no* ruling on its merits. Instead, on March 12, 2008, Energy Division Draft Resolution E-4160 was issued *implementing* SB 1036 based on *no* stakeholder input and *no* reference to or consideration of CEERT’s repeated requests for legal briefing of the issues it resolves. The Draft Resolution speaks for itself as to the complexity of implementation of SB 1036 in its dense, single-spaced 30 pages, complete with findings, conclusions, and orders.

More remarkably, while this Draft Resolution was apparently electronically served on service lists for this proceeding and R.06-05-027, that service was accomplished by an e-mail sent *without* any subject line, *without* any message text identifying what was addressed in accompanying attachments, and *without* any descriptive file name on those attachments, other than the resolution number.

In fact, the e-mail could well be mistaken for junk mail, and CEERT was not even aware of this resolution until it was referenced in a Workshop Agenda electronically served on March 24, 2008, for the MPR Workshop held on March 27, 2008. In that agenda, the Energy Division concludes, without any citation or support, that, while SB 1036 “modified the process by which above-market funds are administered,” it “has no effect on the function of the MPR or the MPR methodology per se.”¹² The Agenda continues to state:

“On March 12, 2008, the Commission, *on its own motion*, issued draft resolution E-4160, which would implement SB 1036, propose eligibility criteria and guidelines for approving requests for above market costs for eligible renewable energy contracts procurement through competitive solicitations. Parties interested in commenting on the implementation of SB 1036 should file comments on draft

¹¹ *Id.*, at p. 7.

¹² 2008 MPR Workshop Agenda, at p. 2.

resolution E-4160, which are due no later than Tuesday, April 1, 2008.”¹³
(Footnote omitted.)

During the Workshop, parties were informed that the issue of SB 1036 was outside the scope of the Workshop. Instead, parties were directed to address this issue only through comment on the Draft Resolution.

II.

DRAFT RESOLUTION E-4160 FAILS TO PROVIDE ADEQUATE NOTICE OR OPPORTUNITY TO BE HEARD ON COMPLEX ISSUES RELEVANT TO THIS PROCEEDING AND MUST BE IMMEDIATELY STAYED AND WITHDRAWN.

The factual summary above details the significant procedural and substantive failings of the Draft Resolution in serving as a vehicle for resolving the complex issues of the Commission’s implementation of SB 1036. Despite CEERT’s own repeated requests to brief these issues, that request has apparently fallen on deaf ears, and the Commission “on its own motion” has proceeded to decide the factual and legal implications of SB 1036 with *no* stakeholder input and *no publicly developed legal or factual record*.

In addition, the “notice” of this action has been alarmingly deficient. Certainly, an e-mail with *no subject heading* and *no descriptive text* cannot be said to provide adequate notice of an important Commission action. In fact, parties accustomed to the traditional use of “resolutions” to address “advice letters,” after notice and opportunity to be heard on such advice letters,¹⁴ would have had no reason to suspect that such a remarkable departure from process was being taken in this case to use a “resolution” to decide significant legal and factual issues outside of a

¹³ 2008 MPR Workshop Agenda, at p. 2; emphasis added.

¹⁴ General Orders 96-A and 96-B.

public record.¹⁵ Further, CEERT has never received any notice or information about the “motion” on which the *Commission, not just the Energy Division staff*, has based this action.

The very act of Energy Division curtailing any open and public discussion of this Draft Resolution, whether at the Workshop or through briefs or comments filed *before-the-fact* of its issuance, only further confirms the *in camera, sua sponte* nature of this action. In addition to inadequate notice, parties’ sole opportunity to be heard has been limited to *after-the-fact, time-constrained* comments on a decision that has already been made. This approach is simply not the same as permitting parties and stakeholders to provide input, through public briefs or even evidentiary hearings, and create a record on which the decision is based in the first place. The fact that discussion of SB 1036 implementation was precluded at the public workshop only exacerbates the deficiencies of this Draft Resolution.

It was, in fact, in recognition of the shortcomings of the Draft Resolution, that CEERT joined with Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), and the California Wind Energy Association (CalWEA) (Requesting Parties) in writing Energy Division on March 26, 2008, with a proposed approach that could be implemented to cure the deficiencies of the Draft Resolution. That letter, which is attached hereto,¹⁶ makes clear the significance of the issues being resolved by the Draft Resolution and the need not only for stakeholder input, but also for the Commission to “take the time and effort to properly consider these issues through more formal and thorough Commission processes.”¹⁷ Although the Requesting Parties recommended a workshop and

¹⁵ In fact, CEERT has never been witness to this unusual process and, to ensure that its concerns have been expressed in all appropriate forums, has not only submitted this motion in this proceeding, but will so move in its comments on the Draft Resolution due on April 1, 2008.

¹⁶ Please note that the Requesting Parties’ letter was mistakenly dated March 28, 2008, but was in fact finalized and served on March 26, 2008.

¹⁷ Requesting Parties’ Letter, at p. 2.

comment process as the first step,¹⁸ the Requesting Parties also observed that “the issues raised with respect to the implementation of SB 1036 may require more formal processes, if these issues cannot be appropriately addressed through workshops.”¹⁹

While CEERT had hoped that this very reasonable request would be acted on quickly by the Energy Division or the Commission, statements made at yesterday’s MPR Workshop by Energy Division staff made clear that the only opportunity parties will have to address Commission implementation of SB 1036 will be through comment on the Draft Resolution. It is for this reason that CEERT has acted today to move for the immediate stay of the Draft Resolution and request that it be formally withdrawn by the Commission in favor of an appropriate process that gives all stakeholders fair notice and an adequate, public opportunity to be heard on this significant issue. Failure to do so ensures that the Commission, if it issues the Draft Resolution, will have adopted an order that is legally flawed both as to process and substance.

III. REQUESTED RELIEF

For the reasons stated above and because the Draft Resolution is scheduled for issuance at the April 10 Commission Business Meeting, CEERT respectfully requests and urges the Commission to act quickly to stay Draft Resolution E-4160 and withdraw it from its April 10 Agenda. Once this action is taken, the Commission should then issue a ruling adopting a briefing schedule or the process proposed by the Requesting Parties to permit all parties the

¹⁸ Although CEERT believes all issues related to SB 1036 should be the subject of briefing, CEERT did join with the Requesting Parties in agreeing to a bifurcation of issues as a reasonable accommodation to the Commission and Energy Division to permit certain accounting treatment of the returned SEP funds to proceed by resolution.

¹⁹ Joint Parties’ Letter, at p. 2.

opportunity to address the issue of SB 1036 implementation. A final decision on SB 1036 implementation should then only be issued based on that record.²⁰

Respectfully submitted,

March 28, 2008

/s/ SARA STECK MYERS

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²⁰ In that process, the contents of the Draft Resolution could be converted to a “Staff White Paper,” which could be used as a starting point, but certainly not a limit on, a full, fair, and public discussion of all issues related to SB 1036 implementation.

ATTACHMENT



William V. Walsh
Attorney
william.v.walsh@sce.com

March 28, 2008

Paul Clanon
Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Joint Party Request For Bifurcation Of Issues Addressed
In Draft Resolution E-4160

Dear Mr. Clanon:

I am writing you on behalf of Southern California Edison Company ("SCE"), Pacific Gas & Electric Company ("PG&E"), San Diego Gas & Electric Company (SDG&E), the Center for Energy Efficiency and Renewable Technologies ("CEERT"), and the California Wind Energy Association ("CalWEA") (the "Requesting Parties"). We are requesting that the California Public Utilities Commission (the "Commission") bifurcate certain issues found in Draft Resolution E-4160, which implements Senate Bill ("SB") 1036, to allow stakeholders in the RPS proceeding to participate in workshops and submit comments on important issues set forth in the Draft Resolution and related to the bill.

SB 1036 terminates the responsibility of the California Energy Commission to administer Supplemental Energy Payments. In its place, SB 1036 establishes a virtual fund (also known as "Above-MPR Funds" or "AMFs") dedicated to pay the above-MPR costs of new eligible renewable energy resources. SB 1036 also provides that the Commission administer these funds.

In an attempt to implement SB 1036, the Draft Resolution provides the following:

- (1) Directs the IOUs to adjust their respective PPP rate components collecting the PGC;
- (2) Directs the IOUs to amortize funds transferred from the New Renewable Resources Account in their Public Purpose Program rate component;
- (3) Directs BVES to establish an account to record unencumbered renewable funds transferred from the CEC back to BVES;
- (4) Establishes the total cost limitation for above-MPR costs each utility can expend on the procurement of eligible renewable energy resources;
- (5) Outlines methodology for an AMF Calculator for the calculation of AMFs requests and the tracking of approved AMFs requests;

- (6) Sets forth eligibility criteria for power purchase agreement costs that may be applied to the cost limitation;
- (7) Sets forth reasonableness standards for reviewing above-MPR contract costs; and
- (8) Sets forth administration rules for the AMFs.

The guidelines and standards related to above-MPR costs and AMFs stated in items 4 through 8 will have a significant impact on the RPS program. These issues greatly impact both the market for renewable development and the IOUs' ability to reach the State's RPS goals and should not be taken lightly. It is imperative that the Commission take the time and effort to properly consider these issues through more formal and thorough Commission processes such as comments and workshops. On the other hand, the Requesting Parties do not see a need to delay the approval of the changes in rate-making for the IOUs provided in the Draft Resolution (items 1 to 3). Therefore, the Commission should remove the consideration of the AMF issues (items 4 to 8) from the Draft Resolution so that they can be given the proper attention, and approve it solely as to the adjustments in the IOUs' rate component (items 1 to 3). A more complete review of the implications of the AMF issues should take place in a 1 to 2 day workshop, based on proposals submitted by interested parties. This information-gathering process will allow RPS market participants, whose regulatory and commercial risks have been established under existing Commission precedent, an opportunity to provide input into the implementation of such an important bill.

Finally, the Requesting Parties have concerns over the process established in the implementation of SB 1036. Traditionally, the implementation of a statute is handled through a formal rulemaking process that includes a defined scope of issues and an assigned Commissioner and Administrative Law Judge. While the Requesting Parties support the process requested in this letter, the issues raised with respect to the implementation of SB 1036 may require more formal processes, if these issues cannot be appropriately addressed through workshops.

Thus, the Requesting Parties respectfully request that:

- 1. The AMF issues identified above be bifurcated from Draft Resolution E-4160;
- 2. Energy Division seek proposals from interested parties regarding the AMF issues after the rate components of E-4160 are adopted;
- 3. Parties file and serve responses on about April 24;
- 4. Energy Division convene a workshop on or about May 5 and 6 in response to parties' comments on the AMF and other related issues regarding the implementation of SB 1036 in an effort to reach consensus; and

5. Energy Division be given the opportunity to issue a new resolution, consistent with comments and recommendations they receive through this process, addressing the AMF issues identified above.

Very truly yours,

/s/ William V. Walsh
William V. Walsh

(on behalf of Evelyn Lee, PG&E; Aimee Smith, SDG&E; Sara Steck Myers, CEERT; Joseph Karp, CalWEA)

cc: Sean Gallagher, CPUC
Paul Douglas, CPUC
R.06-05-027, Service List
R.06-02-012, Service List
Evelyn Lee, PG&E
Aimee Smith, SDG&E
Sara Steck Myers, CEERT
Joseph Karp, CalWEA

CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On March 28, 2008, I served the within document **MOTION OF THE CENTER FOR ENERGY EFFICIENCY AND RENEWABLE TECHNOLOGIES FOR EXPEDITED STAY AND WITHDRAWAL OF DRAFT RESOLUTION E-4160**, in R.06-02-012, with prescribed electronic service on the service lists in R.06-02-012 and R.06-05-027, and same-day, separate delivery by U.S. Mail of hard copies to Assigned Commissioner Peevey and Assigned ALJs Simon and Mattson, at San Francisco, California.

Executed on March 28, 2008, at San Francisco, California.

_____/s/ SARA STECK MYERS

Sara Steck Myers

CERTIFICATE OF SERVICE

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28th Avenue, San Francisco, California 94121.

On April 1, 2008, I served the within document **CEERT COMMENTS ON DRAFT RESOLUTION E-4160**, with mail and electronic service as prescribed in the instructions accompanying Draft Resolution E-4160, including electronic service on Cheryl Lee (CPUC Energy Division), the service lists in R.06-02-012 and R.06-05-027, and personnel required by Rule 14.5 of the Commission's Rules of Practice and Procedure, as well as delivery of an original and two hard copies by U.S. Mail to Honesto Gatchalian (CPUC Energy Division), at San Francisco, California.

Executed on April 1, 2008, San Francisco, California.

/s/ SARA STECK MYERS

Sara Steck Myers